

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

May 19, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PATRICK FLEETWOOD and MICHAEL  
FLEETWOOD,  
Plaintiffs,  
v.  
WASHINGTON STATE UNIVERSITY,  
Defendant.

No. 2:20-CV-00355-SAB

**ORDER REMANDING STATE  
APA CLAIM**

Before the Court are Plaintiffs' Opening Brief Re: APA Claim, ECF No. 21, and Defendant's Motion to Strike Declaration of Matthew Crotty, ECF No. 23. These motions were considered without oral argument. Plaintiffs are represented by Matthew Crotty. Defendant is represented by Debra Lefing and Brian Baker. Having reviewed the briefing and the applicable caselaw, the Court remands Plaintiffs' claim under the Washington State Administrative Procedure Act to the Whitman County Superior Court and dismisses the pending motions as moot.

**Facts**

The facts of this case are not particularly relevant to the present motions. Thus, they are only briefly summarized here.

In the fall of 2018, Plaintiff Patrick Fleetwood was a fourth-year ROTC cadet at Defendant Washington State University ("WSU"). During late November or early December 2018, Plaintiff began a relationship with a first year ROTC

**ORDER REMANDING STATE APA CLAIM # 1**

1 cadet (“C.P.” for Complaining Party). The relationship ended soon after. In  
2 January 2019, C.P. stated that Plaintiff seemed to want to rekindle the relationship,  
3 but became hostile towards her when she refused.

4 On January 18, 2019, C.P. filed a complaint with WSU ROTC against  
5 Plaintiff. That same day, WSU ROTC forwarded C.P.’s complaint to WSU’s  
6 Office of Equal Opportunity (“OEO”—WSU OEO Investigative Assistant Cheryl  
7 Rose reached out to C.P. about filing a Title IX complaint through the Office of  
8 Community Standards.

9 On January 22, 2019, ROTC Lieutenant Colonel Brendan Hobbs informed  
10 Plaintiff that he had requested a Commander Inquiry and formal Title IX  
11 investigation into Plaintiff’s behavior between December 2018 and January 2019  
12 and ordered Plaintiff to cease any communication with C.P. On June 13, 2019,  
13 WSU OEO delivered an Investigation Report, which found Plaintiff responsible for  
14 violating WSU Executive Policy 15 Prohibiting Discrimination, Sexual  
15 Harassment, and Sexual Misconduct (“Executive Policy #15”) based on C.P.’s  
16 claims.

17 On December 5, 2019, Plaintiff met with WSU Director of the Center for  
18 Community Standards and University Conduct Officer, Karen Metzner, in her  
19 office for his WSU formal Conduct Board hearing. However, Plaintiff alleges that  
20 no one else was present at the meeting and that he was neither given the  
21 opportunity to cross-examine witnesses nor to review the file containing the June  
22 13, 2019 investigative report. Then, on December 9, 2019, an Army Disenrollment  
23 Board held a hearing on Plaintiff’s case, which included presentation of evidence,  
24 credibility determinations, and direct and cross-examination of witnesses, which  
25 lasted over 10 hours.

26 On December 16, 2019, WSU—based on Ms. Metzner’s investigation and  
27 meeting with Plaintiff—found Plaintiff responsible for violating three community  
28 standards regarding sexual harassment, violation of university policy, and abuse of

## **ORDER REMANDING STATE APA CLAIM # 2**

1 the student conduct system by discouraging participation in the investigation and  
2 reporting. Also, on December 19, 2019, WSU Army ROTC informed Plaintiff that  
3 he had breached the terms of his ROTC contract in part due to his undesirable  
4 character as evidenced by his violation of WSU Executive Policy #15. On August  
5 13, 2020, the Army officially disenrolled Plaintiff from ROTC and required that he  
6 repay the \$32,617.63 he owed in scholarships.

7 On January 5, 2020, Plaintiff appealed the December 16, 2019 finding to  
8 WSU's University Appeals Board. On February 21, 2020, WSU's Appeals Board  
9 upheld the finding, though did not provide a written explanation for its decision.

10 **Procedural History**

11 Plaintiff filed a complaint in the Whitman County Superior Court in March  
12 2020. ECF No. 5 at 6. He alleged that WSU's Appeals Board decision, affirming  
13 the December 16, 2019 determination that Plaintiff's actions violated WSU  
14 Executive Policy #15, was a misapplication of the law and not supported by  
15 substantial evidence, thereby violating the Washington Administrative Procedure  
16 Act ("state APA claim"). *Id.* at 10-21. WSU filed both its Answer and a Motion to  
17 Dismiss Count One of Plaintiff's Complaint on April 2, 2020. *Id.* at 33, 42.

18 Judge Gary Libey of the Whitman County Superior Court denied WSU's  
19 Motion to Dismiss on May 7, 2020. *Id.* at 94-95. The court then issued an  
20 Administrative Scheduling Order on May 12, 2020. *Id.* at 96-97. Because Plaintiff  
21 sought review of WSU's administrative decision, the state court set deadlines for  
22 the filing of the agency record and the parties' briefing on the issues. *Id.* On June  
23 30, 2020, Ms. Metzner filed the certified agency record with the state court. *Id.* at  
24 111. On July 31, 2020, Plaintiff filed his Opening Brief, as per the Administrative  
25 Scheduling Order. *Id.* at 448. But on August 19, 2020, Plaintiff filed a motion to  
26 amend the complaint to add federal law claims, including claims under the First  
27 Amendment, Fourteenth Amendment, and Title IX. *Id.* at 483-488. The court  
28 granted the motion to amend on September 2, 2020. *Id.* at 577. WSU filed its

**ORDER REMANDING STATE APA CLAIM # 3**

1 Response Brief on September 21st, 2020, and its Answer to Plaintiff's Amended  
 2 Complaint on October 5, 2020. *Id.* at 612-34, 637. On October 2, 2020, WSU filed  
 3 a notice of removal of the case to federal court. ECF No. 1.

4 On October 26, 2020, Plaintiff filed a Motion to Remand with this Court.  
 5 ECF No. 7. On January 21, 2021, the Court denied the motion, stating that  
 6 Defendant could not assert Eleventh Amendment immunity after voluntarily  
 7 removing the case to federal court and that *Younger* abstention did not apply  
 8 because there was no longer an ongoing state proceeding post-removal. ECF No.  
 9 11. The Court then set a jury trial date of June 6, 2022. ECF No. 15. The Court also  
 10 directed the parties to refile any motions that had been pending in state court on  
 11 which the parties required a ruling. ECF No. 17.

12 On March 5, 2021, Plaintiff filed his present motion for a ruling on his  
 13 pending state APA claim. ECF No. 21. That same day, Defendant filed its present  
 14 motion to strike the Declaration of Matthew Crotty ("the Crotty declaration"),  
 15 which Plaintiff submitted in support of his motion. ECF No. 23; *see also* ECF No.  
 16 21-1 (the Crotty declaration).

### 17 Legal Standard

18 Wash. Rev. Code § 34.05.510 states that the Washington Administrative  
 19 Procedure Act is "the exclusive means of judicial review of agency action."<sup>1</sup> The  
 20 statute also states that, for proceedings involving institutions of higher education,  
 21 the petitioner should file for state APA review "either in the county in which the  
 22 principal office of the institution involved is located or in the county of an  
 23 institution's campus if the action involves such campus." Wash. Rev. Code  
 24 § 34.05.514(2). The Washington Supreme Court has clarified that this type of  
 25 filing requirement merely relates to venue and does not affect subject matter

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26  
 27 <sup>1</sup> The statute lays out three exceptions for when non-state APA judicial review is  
 28 available, but none of them apply in the current case.

1 jurisdiction. *Dougherty v. Dep’t of Lab. & Indus. for State of Washington*, 150  
 2 Wash. 2d 310, 316 (2003).

3       Venue for federal courts is generally governed by 28 U.S.C. § 1391.  
 4 However, if a case is removed to federal court from state court, the Supreme Court  
 5 has held that § 1391 no longer applies and the federal court must instead determine  
 6 whether venue is proper under 28 U.S.C. § 1441(a). *Polizzi v. Cowles Mags., Inc.*,  
 7 345 U.S. 663, 665 (1953). § 1441(a) states that “any civil action brought in a State  
 8 court of which the district courts of the United States have original jurisdiction[]  
 9 may be removed by the defendant . . . to the district court of the United States for  
 10 the district and division embracing the place where such action is pending.” Thus,  
 11 venue in federal court is proper if the defendant removed the case to the district in  
 12 which the state action was pending. *See Vu v. Ortho-McNeil Pharm., Inc.*, 602 F.  
 13 Supp. 2d 1151, 1156 (N.D. Cal. 2009). This is true even if venue was proper in the  
 14 state court to begin with. *See Skillnet Sols., Inc. v. Ent. Publications, LLC*, No. C  
 15 11-4865 PSG, 2012 WL 692412, at \*4 (N.D. Cal. Mar. 2, 2012).

16       Some courts have held that, if a defendant properly removes a case to federal  
 17 court under § 1441(a), they waive any improper venue objections. *Id.* Other courts  
 18 state that, “so long as a defendant did not take actions in the state court that would  
 19 have amounted to a waiver of objection to venue, the removal to federal court does  
 20 not waive such defense.” *See Rudder Elec., Inc. v. Consol. Mgmt. Sols., Inc.*, No.  
 21 407-CV-0141-DFH-WGH, 2008 WL 53661, at \*1 (S.D. Ind. Jan. 2, 2008).

22       Here, Defendant removed the case to federal court on the basis of federal  
 23 question jurisdiction. *See* ECF No. 1 at 2. Thus, in order to decide the state APA  
 24 claim, the Court must exercise supplemental jurisdiction over the claim under 28  
 25 U.S.C. § 1337. § 1337(a) provides that, if a case is in federal court on the basis of  
 26 federal question jurisdiction, the district court “shall have supplemental jurisdiction  
 27 over all other claims that are so related to the claims in the action . . . that they  
 28 form part of the same case or controversy under Article III of the United States

## **ORDER REMANDING STATE APA CLAIM # 5**

1 Constitution.” Whether a state law claim forms the “same case or controversy” as  
 2 the federal law claim is governed by the “common nucleus of operative fact” test.  
 3 *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 165 (1997).

4 The Supreme Court has held that a federal district court can still validly  
 5 exercise supplemental jurisdiction over a state law APA-type claim, even if the  
 6 state statute specifically assigns judicial review of the claim to state court. *Id.* at  
 7 169; *see also id.* at 159 (stating that the Illinois Administrative Review Law  
 8 assigned judicial review of final decisions of the municipal landmarks commission  
 9 to state court). However, the Supreme Court also held that “depending on a host of  
 10 factors . . . including the circumstances of the particular case, the nature of the state  
 11 law claims, the character of the governing state law, and the relationship between  
 12 the state and federal claims,” a federal district court has discretion to decline to  
 13 exercise supplemental jurisdiction over state law claims. *Id.* at 173. When  
 14 declining to exercise supplemental jurisdiction, a federal district court must  
 15 consider the values of judicial economy, convenience, fairness, and comity. *Id.*

## 16 Discussion

17 Here, Plaintiff’s state APA claim is against Washington State University, an  
 18 institution of higher education. Thus, Wash. Rev. Code § 34.05.514(2) provides  
 19 that the proper venue for the claim is either the county where WSU’s principal  
 20 office is located or the county where WSU’s campus is located. Plaintiff filed his  
 21 original complaint in Whitman County Superior Court, where WSU is located.  
 22 ECF No. 1-2. Thus, venue for Plaintiff’s state APA claim was proper in Whitman  
 23 County Superior Court.

24 However, in September 2020, Plaintiff amended his complaint to add in  
 25 federal claims under the First Amendment, Fourteenth Amendment, and Title IX.  
 26 Thus, Defendant removed the entire case to federal court in October 2020 on the  
 27 basis of § 1331 federal question jurisdiction. Under § 1441(a), Defendant’s  
 28 removal to federal court was proper because (1) the Court had original jurisdiction

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1 over Plaintiff's federal law claims and (2) Whitman County is in the Eastern  
 2 District of Washington. Therefore, because Defendant's removal satisfied  
 3 § 1441(a), this Court is the proper venue for Plaintiff's case—including his state  
 4 APA claim—even though venue was initially proper in the Whitman County  
 5 Superior Court. *See Skillnet Sols., Inc.*, 2012 WL 692412 at \*4.

6 Despite its own choice to remove the case to federal court, Defendant now  
 7 raises what amounts to an improper venue objection to this Court deciding  
 8 Plaintiff's state APA claim. ECF No. 27 at 2-4.<sup>2</sup> Defendant argues that, though the  
 9 Court has supplemental jurisdiction over the state APA claim under the common  
 10 nucleus test, the Court should decline to exercise it because Wash. Rev. Code  
 11 § 34.05.514(2) specifically assigned judicial review of this type of claim to state  
 12 court. *Id.* In response, Plaintiff argues that Defendant waived any improper venue  
 13 objections by, first, removing Plaintiff's case to federal court and, second,  
 14 opposing Plaintiff's motion to remand the case back to state court. ECF No. 28 at  
 15 19-20.

16 The Court finds that Defendant waived any objections to improper venue.  
 17 Though courts are split on whether a defendant's choice to remove to federal court  
 18 *automatically* waives any improper venue objections, even courts that err on the  
 19 side of no automatic waiver find that a defendant can only maintain improper  
 20 venue objections if the defendant does not take actions that amount to waiver. *See*  
 21 *Rudder Elec., Inc.*, 2008 WL 53661, at \*1 (S.D. Ind. Jan. 2, 2008).

22 In this case, Defendant opposed Plaintiff's motion to remand the case back  
 23 to state court. ECF No. 9. Specifically, Defendant argued that the Court should not  
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25<sup>2</sup> The arguments in Defendant's brief technically argue that the Court lacks  
 26 jurisdiction to hear Plaintiff's state APA claim. ECF No. 27 at 2-4. However, this  
 27 argument is foreclosed by the Supreme Court's decision in *City of Chicago v. Int'l*  
 28 *Coll. of Surgeons*, 522 U.S. 156 (1997).

1 remand because the Court (1) had valid original jurisdiction over Plaintiff's federal  
 2 law claims and (2) could exercise supplemental jurisdiction over Plaintiff's state  
 3 law claims, *including* Plaintiff's state APA claim. *Id.* at 5-7. Thus, allowing  
 4 Defendant to now argue that the Court should not exercise supplemental  
 5 jurisdiction over Plaintiff's state APA claim is counter to Defendant's previous  
 6 representations to the Court.

7       However, in spite of Defendant's inconsistent litigation positions in this  
 8 case, the Court declines to exercise supplemental jurisdiction over Plaintiff's state  
 9 APA claim. When deciding whether to exercise supplemental jurisdiction under §  
 10 1367, the Court considers (1) the circumstances of the case; (2) the nature of the  
 11 state law claims and the governing state law; (3) the relationship between the state  
 12 and federal claims; and (4) the values of judicial economy, convenience, fairness,  
 13 and comity. *Int'l Coll. of Surgeons*, 522 U.S. at 173. Here, these factors weigh in  
 14 favor of remanding the state APA claim back to Whitman County Superior Court.

15       For the circumstances of this case, when comparing the procedural history of  
 16 the case in this Court with the procedural history of the case in state court, it is  
 17 clear that Whitman County Superior Court had significantly more involvement.  
 18 Prior to removal, Judge Libey already heard oral argument and issued a decision  
 19 on WSU's Motion to Dismiss. ECF No. 5 at 94-95. Additionally, the parties had  
 20 already submitted the complete agency record and almost completed briefing on  
 21 Plaintiff's state APA claim before Defendant removed the case to federal court. *Id.*  
 22 at 111, 448, 589, 612.

23       For the nature of the state law claims and the governing state law, Wash.  
 24 Rev. Code § 34.05.514(2) specifically provides that petitions for APA review  
 25 against state institutions of higher education should be heard in state courts.  
 26 Additionally, in order to decide Plaintiff's state APA claim, the Court would have  
 27 to review the complete agency record, which is 692 pages long. ECF No. 5.

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## **ORDER REMANDING STATE APA CLAIM # 8**

With respect to the relationship between the state and federal claims, the extensiveness of the merits analysis required to decide Plaintiff's state APA claim also weighs in favor of remand. In his amended complaint, Plaintiff only asserts three federal claims: (1) WSU's Executive Policy #15 governing sexual harassment violates the First Amendment because it is vague, overbroad, and has a chilling effect on protected expression; (2) Defendant's procedures for finding that Plaintiff violated Executive Policy #15 violated Plaintiff's Fourteenth Amendment due process rights; and (3) Defendant violated Title IX by wrongly concluding that Plaintiff committed an offense and by selectively enforcing Executive Policy #15 against Plaintiff on the basis of gender. ECF No. 1-2 at 72-77. Though Plaintiff has not yet fully litigated these claims, it appears to the Court that they comprise a smaller portion of the case than does Plaintiff's state APA claim.

Finally, all the reasons already stated support that judicial economy, convenience, fairness, and comity weigh in favor of remand. Therefore, pursuant to 28 U.S.C. § 1367, the Court declines to exercise supplemental jurisdiction over Plaintiff's state APA claim and remands the claim to Whitman County Superior Court.<sup>3</sup> Additionally, because the Crotty declaration was submitted in support of Plaintiff's state APA claim, the Court dismisses Defendant's Motion to Strike as moot.

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<sup>3</sup> The Court's decision to remand Plaintiff's state APA claim is not in conflict with its previous order denying Plaintiff's motion to remand. ECF No. 11. As discussed above, the Court's order denying the motion to remand only decided the issues of Eleventh Amendment immunity and *Younger* abstention. Here, the Court remands Plaintiff's state APA claim on the basis of declining to exercise supplemental jurisdiction under § 1367.

## **ORDER REMANDING STATE APA CLAIM # 9**

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Opening Brief Re: APA Claim, ECF No. 21, is

3 **DISMISSED as moot.**

4 2. Defendant's Motion to Strike Declaration of Matthew Crotty, ECF

5 No. 23, is **DISMISSED as moot.**

6 3. Plaintiff's claim under the Washington State Administrative  
7 Procedure Act is **REMANDED** to the Whitman County Superior Court.

8 4. The District Court Clerk is directed to enter this Order and forward  
9 this file with a copy of this Order to the Clerk of the Whitman County Superior

10 Court.

11 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
12 this Order and to provide copies to counsel.

13 **DATED** this 19th day of May 2021.



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17 Stanley A. Bastian

18 Stanley A. Bastian  
19 United States District Judge  
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